IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL K.,	)	
	)	2 CA-JV 2006-0063
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF ECONOMIC SECURITY and BAYVIN K.,	)	Rule 28, Rules of Civil Appellate Procedure
	)	
Appellees.	)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. MD20040071

Honorable Hector E. Campoy, Judge
Honorable Peter J. DeNinno, Judge Pro Tempore

AFFIRMED

Law Office of Scott W. Schlievert
By Scott W. Schlievert — Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings — Tucson
Attorneys for Appellee Arizona Department of Economic Security

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E S P I N O S A, Judge.

¶1 Michael K. is the father of Bayvin K., born in 2004. Michael appeals from the juvenile court's signed minute entry filed September 27, 2005, terminating his parental rights to Bayvin after a jury trial.[1] The jury found the statutory grounds of nine- and fifteen-month out-of-home placement both proven by clear and convincing evidence, *see* A.R.S. § 8-533(B)(8)(a) and (b), and found by a preponderance of the evidence that terminating Michael's rights was in Bayvin's best interest. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶2 In September 2004, Child Protective Services (CPS) took eight-month-old Bayvin and her two older half-brothers into protective custody after investigating a report that the children were being neglected or abused. The Arizona Department of Economic Security (the Department) filed a dependency petition, and Bayvin was adjudicated dependent as to both of her parents in December 2004 based on their pleas of no contest to the petition. The court approved an initial case plan goal of family reunification.

¶3 A year later, after a permanency planning hearing in December 2005, the juvenile court ordered the case plan goal for Bayvin changed from family reunification to severance and adoption. The court based its order on the following findings with respect to Michael: "Mr. K[.] has failed to demonstrate stability in housing, has failed to overcome his alcohol addiction, and has pending criminal charges as a consequence of which he likely will

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[1]The jury found the same grounds established as to Bayvin's mother, Teresa C., and the juvenile court likewise ordered the termination of her parental rights to Bayvin and two other minor children. The mother's separate appeal is our cause no. 2 CA-JV 2006-0066.

remain in custody for some additional years." The Department thus filed a motion to terminate parental rights, alleging as grounds for severance A.R.S. § 8-533(B)(2) (abuse or neglect), § 8-533(B)(3) (mental illness or chronic substance abuse), § 8-533(B)(8)(a) (nine-month out-of-home placement), and § 8-533(B)(8)(b) (fifteen-month out-of-home placement). It later filed an amended motion for termination that eliminated the allegation of abuse or neglect pursuant to § 8-533(B)(2) but added an allegation pursuant to § 8-533(B)(4) that Michael was serving a sentence for a felony conviction that would deprive Bayvin of a normal home for a period of years.

¶4 A jury trial commenced in March 2006. On the morning of the second day of trial, the court provided all counsel with copies of an unnamed—and apparently later depublished—"recent case involving severance proceedings." After a discussion off the record, the Department reportedly concluded it could not proceed with the trial at that point. At its request, the juvenile court dismissed the pending motion for termination without prejudice on March 8, 2006.

¶5 Subsequently in July the Department filed a renewed motion for termination of parental rights, and a jury trial commenced in September. On the fourth day of trial, the jury found clear and convincing evidence justifying severance pursuant to § 8-533(B)(8)(a)

and (b), based on the length of time the children had remained in out-of-home placements and on Michael's failure to remedy the underlying causes for those placements.[2]

¶6 In the sole issue raised on appeal, Michael contends the juvenile court abused its discretion by dismissing the first motion for termination without prejudice during the trial in March and allowing the Department to file a second motion to terminate and proceed to trial again in September. Although he did not make this argument below, Michael now claims the second trial was barred because it was held beyond the time limits provided by Rule 66(B), Ariz. R. P. Juv. Ct., 17B A.R.S., for a termination adjudication hearing and without an express finding of extraordinary circumstances. Rule 66(B) provides:

> If a motion for termination of parental rights was filed, the termination adjudication hearing shall be held no later than ninety (90) days after the permanency hearing. The court may continue the hearing beyond the ninety (90) day time limit for a period of thirty (30) days if it finds that the continuance is necessary for the full, fair and proper presentation of evidence, and the best interests of the child would not be adversely affected. Any continuance beyond thirty (30) days shall only be granted upon a finding of extraordinary circumstances. Extraordinary circumstances include, but are not limited to, acts or omissions that are unforseen or unavoidable. . . . The court's finding of extraordinary circumstances shall be in writing and shall set forth the factual basis for the continuance.

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[2]Apparently the only statutory grounds the jury considered with respect to Michael were the nine-month and fifteen-month out-of-home placement grounds of § 8-533(B)(8)(a) and (b). It does not appear from the available record that the jurors were supplied with forms of verdict that would have permitted them to find § 8-533(B)(2), (B)(3), or (B)(4) as other grounds for terminating Michael's rights to Bayvin.

¶7 The Department filed its first motion to terminate Michael's parental rights on December 29, 2005, nine days after the conclusion of a two-day permanency planning hearing. The first termination adjudication hearing began on March 7, 2006, seventy-seven days after the permanency planning hearing concluded on December 20 and obviously within the ninety-day period dictated by Rule 66(B). The chief consequence of the court's dismissing the first motion for termination on March 8 was to afford Michael additional time and opportunity to comply with the requirements of his case plan and potentially avert further efforts to terminate his rights to Bayvin.

¶8 Michael did not take advantage of that opportunity, although the Department continued to offer him services designed to facilitate reunification. Because Bayvin had previously been adjudicated dependent, however, her legal status was unaffected by the dismissal of the first motion for termination. She remained a dependent child, and the juvenile court continued to hold periodic dependency review hearings as required by A.R.S. § 8-847 and Rule 58(A), Ariz. R. P. Juv. Ct.

¶9 At hearings on June 1, June 8, and June 15, 2006, the court and counsel debated whether another permanency planning hearing would be necessary. On June 15 the Department provided copies of the renewed motion for termination it sought to file. The court found the allegations unchanged from the earlier motion, on which "an extensive two-day permanency planning hearing" had previously been held. All parties except Michael agreed that replicating the permanency hearing would serve no useful purpose. Although

Michael requested a new permanency hearing, the juvenile court ultimately ruled such a hearing unnecessary. The court had already once determined "the future permanent legal status for the child," Rule 60(A), Ariz. R. P. Juv. Ct., and nothing had transpired in the intervening months to warrant changing the permanency goal for Bayvin from severance and adoption.

¶10 The Department filed the second motion to terminate Michael's parental rights on July 7, 2006. Virtually identical to the original motion filed the previous December, the second motion likewise alleged § 8-533(B)(2), (3), (8)(a), and (8)(b) as the statutory grounds for severance. Shortly before the second trial began in September, the Department filed an amended motion, adding the length of Michael's anticipated ten-year sentence for a felony conviction as an additional ground for termination. *See* § 8-533(B)(4).

¶11 The four-day jury trial began on September 12, eighty-nine days after the June 15 hearing at which the juvenile court had ruled a second permanency hearing unnecessary. In effect, on June 15 the juvenile court had ratified—based on the lack of any change in the case plan and Michael's lack of progress toward reunification—its findings at the original permanency hearing months earlier, at which it had ordered the case plan changed to severance and adoption. Nothing in the statute governing permanency hearings, A.R.S. § 8-862, prevents holding more than one such hearing in a dependency proceeding. *Veronica T. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 7, ¶ 18, 126 P.3d 154, 157 (App. 2005). We thus view the June 15 hearing as functionally equivalent to a second permanency hearing, albeit

one at which the juvenile court deemed the presentation of additional evidence unnecessary. Consequently, the severance trial that commenced on September 12 was within the ninety-day time limit of Rule 66(B). *See Veronica T.*, 212 Ariz. 7, ¶ 24, 126 P.3d at 158-59 (when successive permanency hearings held, time limits of § 8-862(D)(2) and Rule 66(B) run from later hearing).

¶12 The procedural events that transpired in this case between March 8 and September 12 were atypical but not improper. The resulting six-month delay inured to Michael's benefit by giving him additional time to complete his case plan tasks and demonstrate fitness to parent Bayvin. If anyone suffered from the delay, it was Bayvin, for whom permanence and finality were deferred longer than they might have been had the first trial been completed in March. But Bayvin's counsel did not object to the delay or to rescheduling the trial in September, and we find no prejudice to Michael.

¶13 Michael requested a second permanency hearing on June 15 despite having agreed with the juvenile court at the previous week's hearing that a new permanency determination would only be necessary if the Department's forthcoming motion for termination contained new allegations beyond those the first motion had contained. The following colloquy occurred at the June 8 hearing, which was held expressly "to determine . . . whether we are going to need to set a permanency planning hearing," depending on what the Department alleged in its renewed motion for termination.

> THE COURT [to counsel for the Department]: I want you to send the motion you propose filing, send a copy of it to the lawyers so they can know whether or not they are going to be willing to proceed with the Court having the severance, proceeding with severance without the necessity of a permanency planning hearing.
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> . . . .
>
> Quite frankly, if it's the same allegations that have previously been made, any of the same allegations that were made in the initial motion that was filed, then I don't think we need a permanency planning hearing. But if there are new allegations, then I think that it's necessary to have a permanency planning hearing unless the parties waive it.
>
> Would you not agree?
>
> [Michael's counsel]: I agree.

Even though the second motion contained no new allegations, counsel retreated from his statement of June 8 and claimed on June 15 that Michael was entitled to a new permanency hearing because the Department had dismissed the original, "fact specific" allegations "because it couldn't meet its burden of proof" at the first trial in March.

¶14 That objection raised below is different than the untimeliness argument Michael now raises for the first time on appeal. At the dependency review hearing on June 1, the court noted that the parents had failed to effect the changes necessary to permit the children's return and that a new permanency planning hearing was potentially necessary. Discussing the challenge of finding available dates on which to hold a permanency hearing, the juvenile court stated: "I don't know when we can find two days on my calendar. It's

probably not going to be for a number of months, summer vacations, that sort of thing, but we will do the best we can." Then, the court asked: "[I]s any body having any problems as far as time frames are concerned? Any problems with violating time limits or anything . . . ?" Michael's counsel replied, "No."

¶15 After denying Michael's request for a new permanency planning hearing on June 15, the juvenile court then proceeded to hold the initial termination hearing on the second motion for termination. Counsel for all parties, including Michael, agreed to the procedure. Then the court and counsel discussed the time limits for scheduling the termination adjudication hearing to follow. Michael's counsel agreed with the court's statement that "we have to have a trial within 90 days of today"; counsel added that the ninety-day limit could "be extended . . . for an additional 30 days for some reason." When the court announced that trial would begin on September 12, Michael did not object. Nor apparently did he object at any point between then and the actual commencement of trial.

¶16 Although we have concluded that the termination adjudication hearing was timely held, even had it been scheduled beyond the time limits of Rule 66(B), "[f]ailure to comply with the Arizona Rules of Procedure for Juvenile Court is not structural error and does not necessarily require reversal." *Veronica T.*, 212 Ariz. 7, ¶ 21, 126 P.3d at 158. By failing to object on timeliness grounds at any point before or after the court scheduled the second trial, Michael waived his right to claim error on appeal. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). Furthermore, by dismissing the first motion

for termination, the court actually conferred a benefit on Michael by allowing him additional time to rehabilitate himself and complete his case plan tasks. *See Veronica T.*, 212 Ariz. 7, ¶ 21, 126 P.3d at 158.

¶17 Michael has provided no controlling authority supporting his contentions. The civil cases and statutes he cites have no application to juvenile proceedings, which are governed by separate statutes and rules containing their own time requirements and constraints.[3] *See, e.g.*, A.R.S. §§ 8-842, 8-847, 8-862, and 8-864; Ariz. R. P. Juv. Ct. 44(B), 44(D), 52(B), 55(B), 56(B), 60(C), 65(B), and 66(B). The cases Michael cites in this portion of his argument involved underlying claims for personal injury, medical malpractice, and fraudulent misrepresentation between private litigants. But Michael overlooks the obvious and important difference between dependency proceedings and ordinary civil actions in terms of what consequences may be appropriate for failure to comply with time limits in each case.

¶18 The purpose of the expedited time limits in juvenile dependency and severance cases is to speed the process of finding permanent placements for dependent children. *Veronica T.*, 212 Ariz. 7, ¶ 15, 126 P.3d at 156-57. The guiding principle in every such proceeding is the best interest of the child. Rule 36, Ariz. R. P. Juv. Ct., provides that the

[3]Michael refers in his argument to A.R.S. § 12-504, apparently faulting the state for not citing or attempting to invoke the savings provisions of that statute. Even if the provisions of chapter 5 of Title 12 applied to juvenile proceedings, which they do not, Michael overlooks § 12-510, which exempts the state from the limitation periods otherwise provided by the chapter.

juvenile rules "should be interpreted . . . to protect the best interests of the child, giving paramount consideration to the health and safety of the child." Even had there been a delay here between permanency hearing and trial that exceeded the time limits specified in Rule 66(B), the appropriate remedy would never be to return a dependent child to an unfit parent.

¶19 We find no error below and no merit to Michael's argument that "the second Motion [for termination] and trial should have been precluded." We do, however, find reasonable evidence in the record supporting the jury's verdicts. Therefore, because the juvenile court's severance order is not clearly erroneous, *see Audra T. v. Arizona Department of Economic Security*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998), we affirm the termination of Michael's parental rights to Bayvin.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge